United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7278

To be argued by
EUGENE L. GIRDEN, ESQ.

United States Court of Appeals

For the Second Circuit

No. 75-7278

REBECCA REYHER and RUTH GANNETT,
Plaintiffs-Appellants,

v.

CHILDREN'S TELEVISION WORKSHOP and
TUESDAY PUBLICATIONS, INC.,
Defendants-Appellees.

BP/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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Statement of the Issues

1. Did the District Court err in characterizing as "derivative" appellants' childrens book where the book consisted of no more than an English translation of a Russian language folktale which the appellant-author admits to having heard from her mother during her childhood?

2. Did the District Court properly dismiss a complaint sounding in copyright infringement where the similarities between appellees' and appellants' work derive soley from and do not go beyond admitted reliance upon a common public domain source?

3. As respects each of the above issues did the District Court properly dismiss appellants' complaint after a full trial on the merits?

Statement of the Case

The Proceedings Below

The complaint charges copyright infringement in that the appellees' works* are claimed to be copied from the appellants' childrens book entitled "My Mother is the Most Beautiful Woman in the World", a folktale retold by Becky Reyher. After extensive oral and written discovery, the appellees moved for summary judgment before trial, contending that since the similarities between the competing works arise only from the use of the same folktale admittedly used by appellant, she is precluded as a matter of law from recovery in an action predicated upon a claim of copyright infringement. By memorandum decision, dated January 28, 1974, Judge Cannella denied the appellees' motion for summary judgment, holding at page 2 thereof, that by reason of the similarity of story line there existed a question of fact precluding summary judgment. Thereafter, the Court, sitting without a jury, conducted a full trial on the merits on April 23 and 24, 1974.

Both the appellants and the appellees submitted trial memoranda and after trial submitted proposed Findings of Fact, Conclusions of Law and post-trial memoranda.

On the evidence, Judge Cannella concluded that appellants' work consisted *entirely* of translating a Russian language folktale and that therefore the work must be

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* Since the appellees' works are fully itemized and described by the District Court in the opinion of the Hon. John M. Cannella filed after his dismissal of the appellants' complaint in the wake of a full trial on the merits, the appellees refer the Court to the opinion printed as item 12 in the supplemental appendix filed herewith by the appellees. Reference to the appellants' appendix herein shall be designated "A- " and all references to the appellees' supplemental appendix are designated herein as "S.A.- "

regarded as "derivative". The Court also found that since there was no textual duplication of any of appellants' intellectual product (her translation) and since the similarities in story line were the product of a common public domain source, appellants could not succeed under the copyright statutes. For these reasons Judge Cannella dismissed the appellants' complaint.

Thereafter, appellants moved the District Court, pursuant to FRCP Rules 52(b) and 59(b), (d) and (e) to reconsider, to amend its Findings of Fact and Law and to make additional Findings, to amend its judgment dismissing the complaint and in the alternative to grant appellants a new trial. By order dated April 1, 1975 Judge Cannella granted the motion to reconsider, reconsidered and denied the appellants' remaining motions. The present appeal followed.

The Facts

Appellees reject appellants' statement of facts in favor of Judge Cannella's statement in his opinion (S.A.-12).

Summary of the Argument

When the author candidly admitted at trial that her copyrighted book is based upon a story which was told to her by her Russian mother (S.A.-1 & 2) and stated the belief that the story told to her by her mother is in fact a Russian folktale (S.A.-3); when she acquiesced in the notations appearing in the copyright registration, copyright certificate and book fly-leaf reading, "A Russian folktale retold by Becky Reyher" (A-71, S.A.-4), and testified that she merely retold the story as told to her by her mother without claiming that she had added anything to the story or changed it in any significant way (S.A.-5), the District Court properly

concluded that the appellants' translation into English of the story which she heard in the Russian language gives rise to a "derivative work" within the meaning of the copyright statutes.

Where a work is "derivative" in character, copyright protection extends only to the intellectual product added by the author. And, as more fully appears in the trial transcript at pages 71 and 72 (S.A.-1), the only intellectual product added by the appellant in this action consists of her translation of the public domain folktale from the Russian language to the English language. Thus, the only material in the appellants' work which is susceptible of copyright protection is the actual textual expression used by Mrs. Reuther. In every other respect she has merely repeated the folktale (S.A.-5). Thus, without a finding that the appellees have duplicated the appellants' textual expression, it cannot be said that appellees appropriated appellants' intellectual product, i.e., appellants' translation.

The trial transcript contains no testimony or evidence of any kind which will support the finding that the appellees have duplicated any textual expression utilized by the appellants. The only phrase which appears in both works is "Once upon a time, long, long ago" (A-7). Furthermore, appellants offered no evidence apart from general circulation to show appellees access to her work. Under these circumstances the outcome is self evident. First, the appellants' work must be a derivative work if it is to be afforded any copyright protection. Secondly, the appellees cannot be held liable for appellants' claim of copyright infringement since there is no evidence to support a finding of duplication of textual expression.

For these reasons, the decision of the District Court must be affirmed.

POINT I

Since the appellants consistently admitted throughout the proceedings below that their book is derived from a pre-existing story, their work must be regarded as "derivative"

On the present appeal the appellants are urging that there is no evidence in the record to support the District Court's conclusion that the appellants' copyrighted book is properly characterized as "derivative." In view of the evidence adduced at trial however, this contention is clearly untenable. The author candidly admitted under oath that her book is based upon a story which was told to her by her Russian mother. (Tr. 120) (S.A.-5) By her own admission she merely retold the story, translating and trying to capture the mood as she did so. (Tr. 71-72) But at no point during any of the proceedings below did the appellant claim that she had added anything to the story or changed it in any significant way. It is thus clear that appellant's book must be designated a "derivative" work. That is, it has been "substantially copied from a prior work" in the public domain. (1 M. Nimmer on *Copyright* § 39 at 166).

In spite of the facts established at trial and set forth above and in spite of the clarity of the Copyright law requiring that where the instant fact pattern is present a copyrighted work must be regarded as "derivative", the appellant continues to resist the inevitable: her copyrighted work must be regarded as derivative if it is to receive any copyright protection at all.

In support of her contrary contention, appellant urges that there is no evidence of a prior work. In the face of the record this contention is manifestly absurd. Time and

again in the proceedings below the appellant testified that her work is based upon a folktale which her mother learned during her childhood. Furthermore, appellants' copyright registration, copyright certificate and the fly-leaf of her book all bear the notation "a folktale retold by Becky Reyher". The significance of those admissions is plain. Having appeared consistently in appellant Reyher's answers to interrogatories, her sworn testimony before trial and again at trial, her statements and representations not only served at trial as judicially admitted fact requiring no additional proof by appellees but also foreclosed the appellant now from ignoring that evidence and requesting a reversal of the decision below. *Gadoleta v. Nederlandsch-Amerekaansch Stoomvart*, 291 F.2d 212, 213 (2d Cir. 1961); *Giaraffa* v. *Moore McCormack Lines, Inc.*, 270 F. Supp. 342 (S.D.N.Y. 1967); 9 Wigmore on Evidence, 3rd Ed., §§ 2590, 2591 and 2733.

The cited authority stands firmly for the proposition that appellants' admissions are properly regarded as judicial admissions and as such, relieved the appellees of any burden to submit additional proof on those issues. But of equal importance with respect to this matter is the force of sheer logic. The appellants' work must be regarded as derivative.

Mrs. Reyher testified at trial that she *heard* the story upon which her copyrighted work is based and added nothing to it in the retelling. Thus if the appellant now contends that apart from her testimony there is no certainty of a prior work, there is nevertheless a certainty that she did not author the story. This is her own admission. The settled fact is that *appellant Reyher is not the author of the folktale* upon which her copyrighted work is based. Therefore, to reverse the decision of the court below is to accept nothing more than the conjectural premise that the

underlying story is not a folktale, and to invite the most specious form of proof consisting of further conjecture about the true identity of the folktale's author. Appellant Reyher does not claim to be the author of the underlying story, thus her work *must* be either a derivative work or an infringing work.*

On this point Section 7 of the Copyright Act provides that:

> "Compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title . . ."

Commenting upon that section, Professor Nimmer writes:

> "It follows then, that any work based in whole or in substantial part upon a prior (or 'underlying') work, if it satisfies the requirements of originality discussed below and is not itself an infringing work, will be separately copyrightable." 1 M. Nimmer on Copyright § 39 at 165.

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* The brief of *Amici Curiae* Writer's Guild does not add anything to appellants' position and references to "appellants" contentions include contentions of *Amici Curiae*. Since there is absolutely no factual basis in the record for concluding that appellant Reyhers' mother authored the folktale which she told, there is *A Fortiori* no basis for finding that appellant's mother had a common law copyright to assign to appellant, contention of the *Amici Curiae* to the contrary notwithstanding. Beyond that, Russia and the United States did not enjoy copyright accord until 1973, 2 M. Nimmer, *Nimmer on Copyright*, Appendix L. p. 1002; accordingly, such a Russian "work" circulated prior thereto within Russia would not enjoy copyright protection within the United States. See 1 M. Nimmer, *Nimmer on Copyright*, § 89.41, p. 333 citing *Ferris* v. *Frohman*, 223 U.S. 424 (1912).

Applying this prescription to the facts in this case, it follows that—since appellants' work is based upon a prior work—it is either a derivative or an infringing work. The court below concluded that it is a derivative work and to the extent that Judge Cannella so found, he sustained the validity of the appellants' limited copyright on the only available theory. Except for the derivative work theory, appellants' work would either be infringing or no more than a repetition of a public domain folktale. See Section 7 of the Copyright Act.

POINT II

Since appellants' work is derived from a public domain folktale retold without change and since there is no duplication by appellees of any textual expression in appellants' work, the District Court properly dismissed appellants' claim of copyright infringement

The accepted rule as restated in the proposed copyright law (*see Goodis* v. *United Artists Television, Inc.*, 425 F.2d 397, 402-03 (2d Cir. 1970); *Rohauer* v. *Killiam Shows, Inc.*, 379 F. Supp. 723, 728 (S.D.N.Y. 1974), is that "[T]he copyright in a derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work . . ." Thus Judge Cannella in the court below properly cited *Harold Lloyd Corp.* v. *Witwer*, 65 F.2d 1, 22-24 (9th Cir. 1933) for guidance on the question critical to appellants' cause:

> [T]he plaintiff . . . should be expected to state to us what it is in the story that it copyrighted as new and novel and what part of such material, if any, has been misappropriated by the appellant.
>
> In the case at Bar, if it be assumed that there are such similarities between [the two stories] as to provoke in the casual observer the consciousness

> that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or not they are novel in the story and thus copyrightable. The copyright of the story only covers what is new and novel in it, so that the question of infringement involves a consideration of what is new and novel in the story to which the author has acquired a monopoly which has been misappropriated by another.

Following this guidance it is at once clear that appellants had the burden at the trial of this action to demonstrate that the appellees have copied material which was appellants' "original intellectual product" as opposed "to the old public domain element of which [the author] has made use." *Costello* v. *Loew's Corp.*, 159 F. Supp. 782, 784 (D.D.C. 1958). As more fully appears in the trial transcript, however, the only original intellectual product provided by the appellant in this action consists of her translation of the public domain folktale from the Russian language to the English language (Tr. 71-72) (S.A.-1). In this regard, appellant testified at trial that she merely retold the story as it was related to her by her mother using two volumes of the Russian-English dictionary to assist in the translation of the folktale she heard. (Tr. 120)

Given the fact that appellant Reyher's original intellectual product consists entirely of her effort in translating, one is forced to conclude—as did the court below—that the only material in the appellants' work which is susceptible of copyright protection is the actual textual expression used by Mrs. Reyher. In every other respect she has merely repeated the folktale (Tr., pp. 119-120). Therefore, without a finding that the appellees have duplicated the appellants'

textual expression, it cannot be said that they appropriated appellants' intellectual product, i.e., appellants' translation.*

In their appeal brief the appellants attempt to go beyond this conclusion so clearly mandated by the record. They argue that the court below made an affirmative finding of substantial similarity sufficient to sustain the ultimate claim of copyright infringement. The Court made no such finding. In the context of Judge Cannella's full opinion it is clear that he found sufficient similarity between the works to support a finding of infringement *if* he had also confronted the defense issues of "access" and "independent creation". However, having found appellants' work derivative, Judge Cannella was not compelled to confront those issues. Therefore, standing alone the court's statement concerning the similarities between the competing works would hardly be dispositive of the appellants'

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* The appellants argue that the Court below found substantial similarity between the contending works, and should have concluded that appellees infringed. This contention is based upon a total misunderstanding of Judge Cannella's opinion and the copyright law. Such similarities between the works as do exist, arise entirely from the use of the common public domain source and, accordingly, give rise to no valid claim. Furthermore, the common source is *only* the public domain folktale and appellants *submitted no proof on the issue of access. Harold Lloyd Corp.* v. *Witwer,* 65 F.2d 1, 22-24 (9th Cir. 1933). [Jon Stone, the man who authored the appellees' works, testified that he heard the same folktale from either his mother or a babysitter telling the story to his younger sister around 1950 (S.A.-9). Working for Children's Television Workshop, he retold that story from his own memory as a part of the Sesame Street Children's Educational Program (S.A.-9). Naturally the story he told has the same sequence of events as that appearing in appellants work and it is this which gives rise to the similarities found by Judge Cannella.] Thus, the similarity cited by appellants gives rise to no valid claim of infringement. And this would also be true even if the Court had found that the appellants' work is not "derivative" since similarities arising from a common theme or the "same old plot" without more, give rise to no valid claim of copyright infringement. *Sheldon* v. *Metro-Goldwyn Pictures Corporation,* 81 F.2d 49, 54 (2d Cir. 1936) *cert. den.,* 298 U.S. 669 (1936); *Dymow* v. *Bolton,* 11 F.2d 690, 691 (2d Cir. 1926).

claim since there was no finding of access and no ruling on the independent creation defense advanced by appellees at trial.

Appellants also cite authority for the proposition that a defendant may become liable for infringement when it is difficult to know where in a derivative work the public domain material ends and a plaintiff's additional creative effort begins [*Italian Book Co.* v. *Rossi,* 27 F.2d 1014 (2d Cir. 1928); *Wihtol* v. *Wells,* 321 F.2d 550 (7th Cir. 1956); and *Mills Music* v. *Cromwell Music,* 126 F. Supp. 54 (S.D.N.Y. 1954)]. These cases are entirely inapposite. Mrs. Reyher has consistently maintained that she merely retold the folktale previously told to her. She added nothing and changed nothing in the bare bones story sequence. Thus, she is not—and is barred by her admissions from now claiming that she is—in the same position as the plaintiffs in those actions cited by her. In each of those cases the plaintiffs used the public domain materials as spring boards for the creation of something different. Here, the record shows that appellant Reyher merely retold the prior work, translating it into English. Thus, if entitled to any protection, she is entitled to copyright protection in no more than her actual textual expression*—her translation.

The trial transcript contains no testimony or evidence of any kind which will support the finding that the appellees

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* The same is true of the appellants' illustration of the reunion scene. Though the court below found that the underlying concept (a child running to the outstretched arms of a mother) is the same in appellants' and appellees' works, the court also found that there is a substantial difference of expression in setting, characters, etc. Thus, the only similarity between each competing illustration arises from the use of the *same idea* and, as the court properly concluded, mere ideas are afforded no copyright protection. *De Montijo* v. *20th Century-Fox Film Corp.,* 40 F. Supp. 133 (S.D. Cal. 1941). Accordingly, appellants are incapable of showing any basis for this court's reversal of the findings of the court below on that issue.

have duplicated any textual expression utilized by the appellant. The only phrase which appears in both works is "Once upon a time, long, long ago". Furthermore, appellants offered no evidence apart from general circulation —to show appellees' access to her work. Under these circumstances the outcome is self evident. First, the appellants' work must be a derivative work if it is to be afforded any copyright protection. Secondly, the appellees cannot be held liable for appellants' claim of copyright infringement since there is no evidence to support a finding of duplication of textual expression.

CONCLUSION

For the reasons stated, the judgment of the District Court, dated January 6, 1975, dismising the complaint should be affirmed.

Respectfully submitted,

Coudert Brothers

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Supplemental Appendix

(71) heard it or from whom, if at all? A. Of my own knowledge?

Q. That's correct, of your own knowledge. A. No.

Q. You do not know? A. No.

Q. So you do not know of your own knowledge that this was a folktale told from mother to child, or anyone else, in any other way in the Ukraine, or anywhere else? A. I only know it was one of the stories my mother told me and she told me a great many.

Q. All right. In what language did your mother tell you that story? A. She told it to me in Russian. And I would like to interpose that I only spoke Russian until I was five, except for a very few words that I spoke to my Negro nurse.

Q. When you wrote your book, you wrote it, I take it, in the English language? A. Yes.

Q. Did that require a translation of what you had heard from your mother? A. It not only required a translation, it required two volumes of a Russian dictionary to check certain words and impressions that I had because this was an impression rather (72) than a literal translation. Anything that I used that she had told me might have been a translation, but it also was primarily a mood and mine was an interpretation.

Q. Well, would you say that your copyrighted book in suit is a literal translation of what you heard from your mother? A. Not at all.

Q. And in what way does it differ from what your mother told you? A. Could I just say something here and interpose something about the title and what my mother told me?

Q. All right, as an illustration let us refer to the title. A. The title of the book which the judge has and which

you have as an exhibit is "My Mother is the Most Beautiful Woman in the World."

Q. That is the title you gave the book? A. That's the title I gave. This was the theme. This was not the title of the Russian story my mother told me from which I retold and adapted my story.

The title and the theme of the book as my mother told it to me translated into English would be "My mama is the most beautiful in the whole world."

In Russian but written phonetically in

(116) That is what he wants to know.

The Witness: Well, I don't know who was the authority for the explicit copyright information.

Q. Did you ever object to that characterization? A. I never objected to it.

Q. I show you Plaintiff's Exhibit 3 in evidence, which is a copy of your book, and I direct your attention to the inside flyleaf which says, "A Russian Folktale Retold by Becky Reyher." Who is responsible for that language being included on the inside flyleaf? A. I would answer in the same way.

Q. What same way? A. As I did before.

Q. That you didn't do it and you didn't authorize it? A. That I—I would like to ask whether I may ask a question when you ask me something.

The Court: No.

The Witness: Not for clarification?

The Court: It is not allowed. You talk to your lawyer when you get through and then if anything has to be clarified your lawyer will put you back on the stand and then he'll ask you questions to

clarify it. But right now, as I just reminded the lawyer, each lawyer is entitled to ask the questions in the form in which he wants, in the (117) direction which he wants and in the area which he wants and unless they are objectionable for some legal reason I will rule upon it. It is your obligation as a witness to answer to the best of your ability.

There are a number of answers which are possible. Amongst them are three little words, "I don't know."

What is the last unanswered question, if there is one?

(Record read)

A. I don't know.

Q. Did you authorize your publisher to include that language? A. I don't recall discussing it with my publisher.

Q. Did you ever object to your publisher about the inclusion of that language? A. No.

Q. I direct your attention to the—

The Court: Is it your present position that this is not a Russian folk story?

The Witness: No, it is not my position. My position is that I told it in my own way. I retold it.

The Court: I realize that, but I am asking you now categorically in your opinion is this a Russian folk story which you rewrote?

(118) The Witness: Yes.

The Court: All right, so it is a Russian folk story? That's the genesis of it?

The Witness: Yes.

The Court: That's all he is trying to establish.

The Witness: I was confused.

Q. I ask you the same question with respect to the title, "A Russian Folktale as Retold by Becky Reyher." A. Probably the publisher, but I didn't object.

Q. Did you ever authorize the publisher to use that language? A. It was not under discussion.

Q. Where would he have gotten that if not from you?

The Court: It's very hard to be big like you and I are and tower over a poor little lady sitting in the witness chair trying to collect her thoughts so go back and let her answer you from the counsel table. This is a small room, we can all hear one another.

Didn't you like the design of this book? That looks like a nice front page there. Didn't you look at it after it came out?

The Witness: After it came out and while it was being made.

The Court: You saw that on there and raised no (119) question about it?

The Witness: No.

Q. I direct your attention to the dedication page, the page in front of the title page. Can you read it out loud, please? A. "For my Russian mother Lisa Hourwich who told this story to me when I was a child, and whose stories still seem to me the most beautiful in the world."

Q. Did you write that dedication? A. I wrote that dedication.

Q. Now, without going into Russian translations, can you please tell me the story, to the best of your recollection, that your mother told you when you were a child? A. I

couldn't possibly tell you the story that my mother told me when I was a child. I am a great grandmother and my mother told me hundreds of stories. I couldn't remember the story that my mother told. I told Mr. Eldridge—may I just—that there was a storyline and that appeared in your testimony.

Q. What was the storyline that you recall that your mother told you? A. The storyline is very simple. It's the story of a child who is lost, is bewildered, terrified and finally finds people who are willing to help her and tells them about (120) her mother who she thinks is beautiful and they go searching for a beautiful woman and they find the child and reunite them. That is the skeleton of the story.

I would like to say at this point—and I don't know if the judge will overrule me—that there is a famous basis for literature, boy meets girl.

Mr. Girden: Your Honor—

The Witness: And I have taken a storyline, but I have adapted it and that's the synonym for retold and that's why I raise no objection to retold. It's my treatment. That's what this book is, even though it was my mother's story.

Q. All right, now, Mrs. Reyher, you testified that innumerable times your story has been read over the radio, sometimes with your permission and sometimes without, is that correct? A. I would not know, but I know if it was without my permission, and I would know if it had been with my permission over the years.

Q. And you stated that hundreds of times the book has been used as the basis for story telling in libraries, is that correct? A. Yes, there is a special library edition of this book and innumerable testimonials from librarians as to the

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(153) A. I am the executive producer and head writer of Sesame Street.

Q. For what period of time have you been associated with Sesame Street as executive producer and head writer? A. As executive producer for the last two years. I was the original head writer and then there was a period of several years in between when there was another gentleman performing that function.

Q. When did Sesame Street start? A. It went on the air in November of 1969.

Q. Prior to your association with Children's Television Workshop, did you have any experience in the television field, particularly with respect to children's programming? A. I was immediately prior to Sesame Street, a free-lance producer producing specials, developing projects for networks.

Prior to that, I was the producer of Captain Kangaroo and wrote that program.

Q. On CBS? A. Yes, and I wrote that program, too, for six years.

Q. In what period of time did you first enter the television field? A. January of 1956.

Q. Have you been continuously in the television field (154) with a stress of children's programming continuously since that time? A. Yes.

Q. Can you please tell the Court what Sesame Street is? A. It's an experimental educational television program which is intended to prepare preschool children for the school experience.

Q. By "preschool," you mean five and under? A. Three, four, and five would be the target audience.

Q. In the period of time from the inception of the program in 1969, say, through the end of 1970, what was your

particular function with respect to the program? A. I was one of several producers and my primary duties were as head writer.

Q. How many times a week was the program produced? A. On the air?

Q. Yes. A. It's on the air daily for at least an hour and in most markets it's on the air several hours a day.

Q. Is Children's Television Workshop a nonprofit organization? A. Yes.

Q. Does it exist by outside grants? (155) A. Primarily, yes.

Q. And are the programs over public television? A. They are.

Q. Are the programs sponsored? A. No.

Q. In the period November of 1970, approximately how many programs per week were you writing and producing? A. I was writing two scripts a week and editing the other scripts.

Q. How did you go about picking subject matter for any particular program? Let's concentrate on the program of November 18, 1970. Do you recall how you picked the subject matter for that program? A. The show was written according to a very strictly structured curriculum. Sesame Street has a number of educational goals and they are divided by a curriculum coordinator over the 130 programs that we would produce in any given season. For the particular day you have mentioned, there would have been —there was—a curriculum page which told me as the writer what areas I was to cover in terms of curriculum on that given day.

Mr. Girden: I would like marked as Defendants' Exhibit A for identification a curriculum sheet for show number 138.

(Defendants' Exhibit A marked for identification.)

(156) Q. I show you Defendants' Exhibit A for identification and ask if you can identify it? A. Yes.

Q. How do you identify it? A. That would be the curriculum sheet for show number 138.

Q. Was the show broadcast on November 18, 1970? A. I believe so.

Mr. S. Stoll: Is there any reference here to the Sesame Street presentation of "The Most Beautiful Woman in the World"?

Mr. Girden: We will get to that, Mr. Stoll.

Mr. S. Stoll: Subject to tying it in, I won't object to it if they can tie it in.

The Court: All right, received with that condition.

(Defendants' Exhibit A for identification received in evidence.)

Q. I show you Defendants' Exhibit A in evidence and ask you who prepares these curriculum sheets. A. This one was prepared, I believe, by Joan Lufrano, L-U-F-R-A-N-O.

Q. When you receive that curriculum sheet, how do you then go about structuring the program of the day in question? A. It would be my responsibility as a writer to (157) incorporate as many of these curriculum items as I possibly could into the show for that particular day.

Q. Was there a particular curriculum item on that particular day which eventually led to the writing of "The Most Beautiful Woman in the World"? A. There is, under the general heading of "Cognitive Organization," subheading "Perceptual Discrimination," there was the assignment "Objective-Subjective Discrimination."

At that time we had two separate curriculum goals. One was "Subjective-Objective Discrimination." The other was "Differing Perspectives." They have since been lumped together under the general heading because we found they were so similar they weren't really treated as separate items.

The point of view to be gotten across, which is a very important early education object, is what may look one way to one person oftentimes looks different to another person.

Q. Did you make the determination how you would depict that orally and visually to your Sesame Street audience? A. I did.

Q. How did you make this determination? A. Well, I remembered this story in years past and thought it was an excellent example of just that, this (158) differing perspective.

Q. From what period of time in your life do you recall this story? A. It was a story that was told to my sister when she was a very young child, and my sister was fifteen years younger than I am, so she was a child. This would have been around 1950 when she was about five years old.

Q. Approximately 22 to 24 years ago? A. Yes, approximately.

Q. Do you recall hearing this story told to your sister? A. Well, I recall the story told at that time. I don't recall specifically who told it to her. It was a favorite of hers. It was almost certainly either my mother or a woman called Mrs. Looney, who was a daily babysitter and helper in our household.

Q. What did you recall in your memory of the story as you heard it? Approximately 24 years ago. A. I remembered the shape of the story as a sort of folktale, fairy tale idea.

Stone—Direct

Q. Can you please recite for the record what it is you remembered of the story as you heard it in around 1950?
A. Well, the story, as best I can recall it some 20 odd years later, would be, "Once upon a time, many years ago," (159) and I remember it being characterized as being in Russia.

Some people were out working one day and they heard a child crying. So they found out who it was and they discovered a little boy and the little boy was crying so hard he couldn't talk very well. So they said to him, "Who is your mother?"

And then the boy stopped crying for a minute and he said, "Oh, my mother is the most beautiful woman in the world."

They said, "That's easy enough, just find the most beautiful woman and bring here around and that would be the boy's mother."

So they did. They brought the most beautiful woman around and the boy said to her, "No, that's not my mother, my mother is the most beautiful woman in the world."

They said, "Who is the most beautiful woman in our village? Maybe we better go farther afield."

They went farther away and kept bringing back beautiful woman and showed them to the little boy. And the little boy said, "No, that's not my mother. She's the most beautiful woman in the world."

By that time someone came to the crowd gathered by this time, and it was somebody whose hands were worn from working in the field and quite old and gray-haired and eyes (160) red from crying. And the little boy immediately identified her as his mother and said, "Mother."

And they were terribly surprised and said, "But this surely can't be your mother. You told us your mother was the most beautiful woman in the world."

The boy said, "She is, look at her."

The point being that what is beautiful for one person may not be to another.

Q. Did you tell that story as the example of the differing perspective facets of your program? A. Yes.

Q. What did you do next? A. The next step I would normally take is decide what form the story should take, that is, should our live actors act it out on a set or in another set, or would it best be deferred and be made into a film or an animation. And I decided to do it with puppets. I used a form I do frequently on the show and that is a narrator.

Q. Did you write the scripts for the segment we are talking about? A. I did.

Q. How do you go about writing the scripts? A. I take a legal-size yellow pad and make notes to myself in pencil and from those notes I type the script.

Memorandum Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 627 (JMC)

No. 41688

—o—

REBECCA REYHER and RUTH GANNETT,

Plaintiffs,

against

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Defendants.

—o—

CANNELLA, *D.J.*:

This copyright infringement action was tried to the Court without a jury. After consideration of the facts presented and the law applicable thereto, the Court finds for the defendant and dismisses the complaint.

The plaintiffs herein, Rebecca Reyher and Ruth Gannett, the copyright holders, and respectively the author and illustrator of a children's book entitled, "My Mother Is the Most Beautiful Woman in the World," allege that the defendants, Children's Television Workshop ("CTW" and Tuesday Publications, Inc. ("TPI"), have copied said book and, have, thereby infringed upon plaintiffs' copyright. The alleged infringement occurred when CTW, a non-profit corporation, engaged in, among other activities, the production of the educational children' television program known as "Sesame Street", produced and caused to

be shown on television a segment of the "Sesame Street" program entitled "The Most Beautiful Woman in the World" and when, thereafter, CTW caused articles to be published in both the English and Spanish language versions of the Sesame Street Magazine entitled "The Most Beautiful Woman in the World." Finally, it is alleged that TPI infringed upon plaintiffs' copyright by causing the publication, in an edition of "Tuesday at Home", of a story entitled "The Most Beautiful Woman in the World".

Plaintiffs' book, which was copyrighted in 1945, tells a simple but pointed story. In essence, it relates the tale of a small Russian peasant girl who is lost in the Ukraine. The little girl, having been separated from her mother, makes her way to a village where she tells the inhabitants only that "my mother is the most beautiful woman in the world." Upon hearing this, the villagers proceed to search the surrounding area and to bring all of the local beauties to see the little girl in the hope that one of them will turn out to be her mother. Eventually, the little girl's mother does appear, she is, to the villagers' surprise, a rather homely looking woman. The little girl, however, is not surprised and tells the villagers, "this is my mother, the most beautiful woman in the world." The moral, as the village leader points out, is that "we do not love people because they are beautiful, but they seem beautiful to us because we love them."

It is clear to this Court, having viewed the relevant "Sesame Street" segment and read the three magazine articles involved, that there is a substantial similarity between plaintiffs' copyrighted book and defendants' allegedly infringing works. Although the only phrase which appears in both books is "Once upon a time, long, long ago," and although there is little, if any, actual para-

phrasing of plaintiffs' book in defendants' works, no individual comparing the works at bar could help but conclude that they are substantially similar. While defendants' rendition of the story takes place in a different locale and is told with fewer frills than plaintiffs', both stories present an identical sequence of events.

Nontheless, before it can be determined whether there has been an infringement of plaintiffs' copyright, the Court must first determine exactly what is protected by that copyright. In the instant case, we have a book which the author candidly admits is based upon a story which was told to her by her Russian mother. It is the belief of plaintiff Reyher (although no direct evidence was adduced to this effect) that the story told to her by her mother is in fact a Russian folk tale. It is clear from plaintiff's testimony that the story line as it appears in her copyrighted book is substantially taken from, if not identical with, the story told to her by her mother. Mrs. Reyher testified that she had "taken a storyline, but I have adapted it and that's a synonym for retold and that's why I raise no objection to retold. It's my treatment. That's what this book is, even though it was my mother's story." (Tr. 120)

Plaintiff did not testify that she had added anything to the story or changed it in any significant way. In fact, the plaintiff indicated that she wrote the book using a Russian dictionary. This clearly suggests a process whereby plaintiff attempted to recall the story as told to her by her mother in Russian, and then to translate that recollection into English. As plaintiff Reyher herself explained the process,

> [i]t not only required a translation, it required two volumes of a Russian dictionary to check certain words and impressions that I had because this was

> an impression rather than a literal translation. Anything I used that she [her mother] had told me might have been a translation, but it also was primarily a mood and mine was an interpretation. (Tr. 71-72)

It is thus clear to the Court that plaintiffs' book is a "derivative" work. That is, it has been "substantially copied from a prior work" in the public domain. (1 M. Nimmer on *Copyright* § 39 at 166). The accepted rule as restated in the proposed copyright law (*See Goodis* v. *United Artists Television, Inc.*, 425 F.2d 397, 402-03 (2d Cir. 1970); *Rohauer* v. *Killiam Shows, Inc.*, 379 F.Supp. 723, 728 (S.D.N.Y. 1974)), is that "[t]he copyright in a derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work. . . ." As one court has put it, if the work allegedly infringed upon is of a derivative nature,

> [t]he plaintiff . . . should be expected to state to us what it is in the story that is copyrightable as new and novel and what part of such material, if any, has been misappropriated by the appellant.
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>
> In the case at bar, if it be assumed that there are such similarities between [the two stories] as to provoke in the casual observer the consciousness that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or not they are novel in the story and thus

> copyrightable. The copyright of the story only covers what is new and novel in it, so that the question of infringement involves a consideration of what is new and novel in the story to which the author has acquired a monopoly which has been misappropriated by another. *Harold Lloyd Corp.* v. *Witwer,* 65 F.2d 1, 22-24 (9th Cir. 1933). *See also Axelbank* v. *Rony,* 277 F.2d 314, 317 (9th Cir. 1960).

Given the derivative nature of plaintiffs' work, the plaintiffs can prevail only if defendants have copied material which was plaintiffs' "original intellectual product" as opposed "to the old public domain elements of which [the author] has made use." *Costello* v. *Loew's Corp.,* 159 F.Supp. 782, 784 (D.D.C. 1958). Here, Reyher's "original intellectual product" surely includes the translation of her mother's story, and it just as surely does *not* include the plot or sequence of events appearing therein. *There is no allegation and the facts will not support a finding that the defendants have either copied plaintiffs' work verbatim, or have paraphrased it.* The most that could be said is that they have read the plaintiffs' work and have retold the story in their own words. Such a finding will not, given the derivative nature of plaintiffs' work, support a cause of action for copyright infringement. The defendants have not infringed upon any substantial portion of plaintiffs' copyrighted book in which plaintiffs can claim a proprietary interest granted by the copyright laws. In a sense, the defendants have done nothing more than make their own variation of the story Mrs. Reyher's mother had told her as a child. *There being no claim by Mrs. Reyher that her mother's story is copyrighted or that it is entitled to any form of protection, the defendants have the same right to make use of it as does Mrs. Reyher, herself.* Thus, defendants' use of a story line which is substantially similar

to that appearing in plaintiffs copyrighted book does not give rise to a cause of action under the copyright laws.

In addition to the claim that the defendants have copied the story appearing in "My Mother is the Most Beautiful Woman in the World," plaintiffs allege that a drawing by Tybor Gergley, depicting the reunion scene at the conclusion of the story, appearing in defendant TPI's publication "Tuesday At Home," infringed upon an illustration by Ruth Gannett appearing in plaintiffs' copyrighted book. The Court, having compared the Gannett drawing with that by Tybor Gergley, finds that the Gergley illustration does not infringe upon Gannett's work.

In determining whether or not the Gergley illustration of the reunion scene is an infringement of Gannett's drawing of the same event, it is helpful to recall the words of Judge Learned Hand in a case involving the infringement of a textile design copyright:

> The test for infringement of a copyright is of necessity vague. In the case of verbal "works" it is well settled that although the "proprietor's" monopoly extends beyond an exact reproduction of the words, there can be no copyright in the "ideas" disclosed but only in their "expression." Obviously, no principle can be stated as to when an imitator has gone beyond copying the "idea," and has borrowed its "expression." Decisions must therefore inevitably be *ad hoc*. In the case of designs, which are addressed to the aesthetic sensibilities of an observer, the test is, if possible, even more intangible. No one disputes that the copyright extends beyond a photographic reproduction of the design, but one cannot say how far an imitator must depart from an undeviating reproduction to escape infringement. *Peter*

Memorandum Opinion

Pan Fabrics, Inc. v. *Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

Although the two illustrations here at issue do evince more than a passing similarity (in both the reunited mother an child are depicted running toward each other with arms similarly outstretched, in both the child's feet are positioned with the left foot raised in a similar fashion, finally, in both the posture of the mother and the relative positioning of the mother and child are similar), it is this Court's finding that the differences between the two (the characters in the more impressionistic Gergely illustration are black Africans dressed in their native garb, while in the Gannett drawing they are Caucasians in Russian peasant outfits, additionally, the Gergley child is a boy while Gannett's is a girl, and the Gergley mother has a package on her back and a stick at her feet while the Gannett mother is shown without accoutrements) are so substantial that the "average layman would indeed detect numerous differences . . . which tend to eliminate any substantial similarity of protected expression." *Herbert Rosenthal Jewelry Corp.* v. *Honora Jewelry Co., Inc.*, No. 74-1774 (2d Cir. Dec. 20, 1974) slip op. at 234 (footnote omitted). Thus, it cannot be said that the Gergley illustration infringes upon Gannett's work.

For the reasons set forth above, it is hereby ordered that the complaint be and hereby is dismissed, with costs, but without attorney's fees, to the defendants.

The foregoing constitute the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

Enter Judgment.

JOHN M. CANNELLA, *U.S.D.J.*

Dated: New York, N.Y.
January 6, 1975

Service of three (3) copies of the [illegible]
is admitted this 28th day of July, 1975

Eleanor Jackson Piel
(IV)